

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF VETERANS AFFAIRS

Michael T. Earsom v.
Hennepin County

FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge Beverly Jones Heydinger at 9:30 a.m. on December 8, 1999 the Office of Administrative Hearings, 100 Washington Avenue South, Suite 1700, Minneapolis, Minnesota 55401. The record closed at the end of the hearing.

Martin D. Munic, Assistant County Attorney, 300 South 6th Street, Suite C-2000, Minneapolis, MN 55487, appeared on behalf of Hennepin County. Michael T. Earsom, 3170 118th Avenue Northwest, Coon Rapids, MN 55433, appeared on his own behalf.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of the Minnesota Department of Veterans Affairs will make the final decision after reviewing the administrative record. The Commissioner may adopt, reject or modify these Findings of Fact, Conclusions and Recommendation. Under Minnesota law^[1], the Commissioner may not make his final decision until after the parties have had access to this report for at least ten days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. Parties should contact the office of Bernie Melter, Commissioner, Minnesota Department of Veterans Affairs, Veterans Service Building, St. Paul, Minnesota 55155-2079, to find out how to file exceptions or present argument.

STATEMENT OF ISSUE

Was Michael T. Earsom constructively discharged without receiving the appropriate notice of his right to request a hearing under the Veterans Preference Act?

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Michael T. Earsom resides at 3170 118th Avenue N.W., Coon Rapids, Minnesota 55433. Mr. Earsom served on active duty in the United States Marine Corps from July 10, 1974 until July 15, 1975, after which he was honorably discharged.^[2]
2. Mr. Earsom was appointed to a part-time position (40 hours per pay period) as a Laboratory Assistant at the Hennepin County Medical Center ("HCMC"), effective January 11, 1999.^[3]
3. The Hennepin County Medical Center is a public health care facility located in Minneapolis, Minnesota, and is operated by County of Hennepin. HCMC's personnel practices are governed by a Hennepin County Human Resources Rules.
4. Like other new employees in similar positions, Mr. Earsom was placed on probation for the first 1,040 hours of work.^[4]
5. On March 4, 1999, Mr. Earsom requested an increase to full-time work (80 hours per pay period). That request was approved, effective March 28, 1999.^[5]
6. In April 1999, Mr. Earsom had a "two month review". This was the first of two reviews ordinarily completed for an employee on probation. Karen M. George, Client Services Supervisor, and Mr. Earsom's direct supervisor, conducted the review and scored Mr. Earsom a "2" – needs improvement.^[6]
7. At the time of the evaluation, Ms. George explained Earsom had misidentified some blood samples, and that unless Mr. Earsom showed improvement it was possible he would not pass probation.^[7]
8. Ms. George and Mr. Earsom discussed techniques for assuring that the blood identifications were correct. Ms. George assured Mr. Earsom that he had a lot of potential. Ms. George arranged for a senior laboratory technician to observe Mr. Earsom.^[8]
9. From April through August, Mr. Earsom repeatedly asked Ms. George and co-workers if he was going to pass probation.^[9]
10. Ms. George told Mr. Earsom that no decision had been made, that he still had time to demonstrate proficiency. At no time did she tell him he would fail his probation.^[10]
11. On June 28, 1999, Mr. Earsom received a written reprimand from Ms. George "due to the recurring problem of misidentification of patient samples." The reprimand included a warning that reoccurrences of the same kind of error could lead to "further progressive discipline including the failure to pass probation."^[11]
12. In July 1999, a second probationary review form was forwarded to Ms. George, covering the first 784 hours of Mr. Earsom's employment. However, around July 23, 1999, Mr. Earsom requested a reduction in his hours. Ms. George was to complete the review by September 15, 1999. It was never completed.^[12]
13. Mr. Earsom told Ms. George that he wanted the reduction in hours because of the stress of the job and at home. He asked if Ms. George had made a decision about his probation. She told him she had received the evaluation form, but had not given any thought to it because it was premature.

14. On several occasions, Mr. Earsom asked Ms. George if he was going to pass his probation and told her that the pressure of probation was difficult for him. Each time she responded that no decision had been made.^[13]

15. At the end of August, Mr. Earsom was ill and missed work. Ms. George called him at home about August 27, 1999, to remind Mr. Earsom to bring a doctor's statement when he returned to work.^[14] The call lasted for about an hour. Mr. Earsom once again pressed Ms. George for a decision about his probation. He repeated that the stress of probation was affecting his job performance, and that the job stress was very difficult for him.^[15]

16. Mr. Earsom told Ms. George that he felt he had no options; she explained that extending the probation was an option, but that information upset Mr. Earsom, and he told Ms. George he would quit. Ms. George once again told Mr. Earsom that there was no decision that he had failed probation and she reminded him that he was required to give two weeks notice if he quit.^[16]

17. Mr. Earsom returned to work and gave written notice, dated August 29, 1999, of his intent to leave the lab "unless I can pass my probationary period. Also, I could be leaving sooner if a job becomes open."^[17]

18. Based on their prior conversation, Ms. George interpreted the note as Mr. Earsom's notice of resignation. Ms. George calculated that termination was effective on September 12, 1999, and made that notation on Mr. Earsom's note.^[18]

19. On August 31, 1999, Mr. Earsom and Ms. George met with Ms. George's supervisor, Patricia Ellinger, Lab Manager. Mr. Earsom brought a form to the meeting requesting a transfer to the EKG department of HCMC, effective immediately. Ms. Ellinger helped Mr. Earsom complete the form, and Mr. Earsom, Ms. Ellinger and Ms. George signed it.^[19] After consulting with David Eggen, Senior Human Resources Representative, the two weeks notice of termination was waived, and Mr. Earsom's immediate transfer was approved. The meeting was cordial. Mr. Earsom hoped there were no hard feelings; Ms. George and Ms. Ellinger wished him well.

20. By letter to Mr. Earsom dated September 3, 1999, Ms. Ellinger reiterated that she had accepted his resignation from his laboratory assistant position. She advised Mr. Earsom that no decision about his probation had been made prior to the resignation. She notified Mr. Earsom that had he not passed probation, he would have had the right to request a hearing under the Veteran's Preference Act, and that, if he did so, HCMC would have to establish incompetence or misconduct as the basis for the removal.^[20]

21. At no time prior to the September 3rd letter did Ms. George or Ms. Ellinger notify Mr. Earsom of his right to a hearing under the Veterans Preference Act if he failed the probation period.^[21]

22. Ms. George could not recall if she knew Mr. Earsom was a veteran when she met with Mr. Earsom and Ms. Ellinger on August 31, 1999.^[22] Ms. Ellinger did not know Mr. Earsom was a veteran when the three met.^[23] Both Ms. George and Ms. Ellinger testified that the probation was not discussed at the meeting because it was apparent

that Mr. Earsom wanted to resign from the lab and take a position in the EKG department.^[24]

23. Ms. George and Ms. Ellinger confer on hiring and probation decisions. Because of the time it takes to hire and train a new employee, both try to work with probationary employees to develop the necessary skills to be successful. Neither had reached a decision about Mr. Earsom's probation at the time that he submitted his notice dated August 29, 1999.^[25]

24. Ms. George and Ms. Ellinger are not routinely informed about the veterans status of their employees, nor do they ordinarily see an employee's job application. Ordinarily they would be notified about an employee's status as a veteran as needed by the HCMC Human Resources Department. The Human Resources Department gave them information about Mr. Earsom's veterans' status when it learned of his resignation from the laboratory assistant position.^[26]

25. At no time prior to sending Exhibit 8 did Ms. George or Ms. Ellinger tell Mr. Earsom what standard HCMC would have to prove if he failed probation and requested a hearing under the Veteran's Preference Act.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Commissioner of Veterans Affairs and the Administrative Law Judge have jurisdiction in this matter.^[27]

2. The Department of Veterans Affairs gave proper notice of this hearing and has complied with all relevant substantive and procedural requirements of statute.

3. The Department gave the parties proper and timely notice of the hearing in this matter.

4. Mr. Earsom is an honorably discharged "veteran" within the meaning of the Minnesota Veterans Preference Act ("VPA" or "Act"),^[28] and he is entitled to all of the protections and benefits of that Act.

5. Hennepin County Medical Center is a county-operated public medical facility and its personnel practices are subject to the provisions of the Veterans Preference Act.^[29]

6. A public employer must give a veteran notice of the right to a hearing to establish incompetency or misconduct prior to any action to remove the veteran from his or her position.^[30] The employer must notify the veteran in writing of its intent to discharge, and inform the veteran of his or her right to a hearing within sixty (60) days of receipt of this notice.^[31]

7. Under Minnesota case law, a veteran is considered "removed" from his or her position, within the meaning of the VPA, if the public employer constructively discharges the veteran or, put another way, if the employer's action has the effect of taking away the veteran's employment.^[32]

8. There is no evidence in this case that Mr. Earsom's supervisors at Hennepin County Medical Center intended to discharge him, nor did Mr. Earsom ever receive a written notification of his employer's intent to discharge him.

9. Mr. Earsom was not constructively discharged or removed from his position at Hennepin County Medical Center within the meaning of the VPA. Consequently, the County did not violate the Veterans Preference Act by failing to give Mr. Earsom notice of a right to a hearing, or by failing to notify him that, if a hearing occurred, HCMC would have to establish incompetence or misconduct as the basis for the removal.

10. The Administrative Law Judge adopts as Conclusions any Findings that are more appropriately described as Conclusions.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

The Administrative Law Judge respectfully recommends that the Commissioner of Veterans Affairs DISMISS the Petition of Michael T. Earsom.

Dated this 7th day of January, 2000.

S/ Beverly Jones Heydinger

BEVERLY JONES HEYDINGER
Administrative Law Judge

Reported: Tape Recorded.

NOTICE

The Commissioner of Veterans Affairs is required to serve his final decision upon each party and the Administrative Law Judge by first class mail. [\[33\]](#)

MEMORANDUM

The Veterans Preference Act states, in relevant part, that:

[n]o person holding a position by appointment or employment in the several counties, cities, towns, school districts and all other political subdivisions in the state, who is a veteran separated from the military service under honorable conditions, shall be removed from such position

or employment except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, in writing.^[34]

The Act also states that “[a]ny veteran who has been notified of the intent to discharge the veteran from an appointed position or employment pursuant to this section shall be notified in writing of such intent to discharge and of the veteran’s right to request a hearing within 60 days of receipt of the notice of intent to discharge.”^[35] The Act requires an employer to notify the veteran of its intent to discharge and his right to a hearing. In this case, the county did not issue a notice that it intended to remove Mr. Earsom from employment. However, a veteran who is constructively discharged or effectively removed from his or her position, maintains hearing rights under the VPA.

Mr. Earsom claims that he was constructively removed from employment because the stress of passing his probationary period was too much and it was affecting his job performance. Under Minnesota law, if an employer’s action has the effect of taking away the veteran’s employment, then the veteran is considered “removed.”^[36] Worded another way, “a veteran is removed from his or her position [within the meaning of the VPA] when the effect of the employer’s action is to make it unlikely or improbable that the veteran will be able to return to the job.”^[37] The facts in this case do not demonstrate that Mr. Earsom was removed from his position at HCMC. He continued to report to work in the lab until this transfer was approved on August 31, 1999. If Mr. Earsom cannot show he was removed (constructively or otherwise), he has no rights to a hearing under the VPA.

The facts in this case do not demonstrate that the county’s actions effectively took away Mr. Earsom’s position as a Laboratory Assistant. While the County did warn Mr. Earsom that if he did not improve his work performance, he might fail his probationary period, this statement was made primarily because Mr. Earsom had misidentified patient blood samples. The record demonstrates that such errors are serious because they could result in erroneous treatment of patients.^[38] Hennepin County Medical Center is responsible for diagnosing and treating sick patients, and warning Mr. Earsom that misidentifying patient blood samples will not be tolerated was a legitimate exercise of the medical center’s administrative authority.^[39] The uncertainty about probation was stressful, and may have made the job more difficult for Mr. Earsom. However, a probationary period is common and HCMC’s use of it and evaluation during probation are appropriate. Although a person who fails probation may lose the job, the right to a hearing arises when that decision is made. Adherence to a policy employing a probationary period will not be equated to “constructive dismissal.” Mr. Earsom did not demonstrate that he was constructively discharged or otherwise removed from his position as a Laboratory Assistant within the meaning of the VPA. Consequently, the County did not violate the Act by failing to notify Mr. Earsom of his rights to a hearing, or the standard of proof if a hearing were held.

B.J.H.

^[1] Minnesota Statutes, section 14.61 (1998).

- ^[2] DD Form 214 attached to Petition for Relief.
- ^[3] Exhibit 1.
- ^[4] Id.
- ^[5] Exhibit 2.
- ^[6] Testimony of Karen George; Exhibit 4; Exhibit 13.
- ^[7] Testimony of Karen George.
- ^[8] Id.
- ^[9] Id.
- ^[10] Id.
- ^[11] Exhibit 12.
- ^[12] Exhibit 5; testimony of K. George.
- ^[13] Testimony of K. George.
- ^[14] Id.
- ^[15] Id.
- ^[16] Id.
- ^[17] Exhibit 6.
- ^[18] Exhibit 6.
- ^[19] Exhibit 7; testimony of K. George; Exhibit 6.
- ^[20] Exhibit 8.
- ^[21] Testimony if K. George and P. Ellinger.
- ^[22] Testimony of K. George.
- ^[23] Testimony of P. Ellinger.
- ^[24] Testimony of K. George and P. Ellinger.
- ^[25] Id.
- ^[26] Id.
- ^[27] Minnesota Statutes, section 14.50, and section 197.46.
- ^[28] Minnesota Statutes, section 197.447, and section 197.46.
- ^[29] Minnesota Statutes, section 197.46.
- ^[30] Id.
- ^[31] Id.
- ^[32] Johnson v. County of Anoka, 536 N.W.2d 336, 339 (Minn. Ct. App. 1995).
- ^[33] Minnesota Statutes, section 14.62, subdivision 1.
- ^[34] Minnesota Statutes, section 197.46 (emphasis supplied).
- ^[35] Id.
- ^[36] Johnson v. County of Anoka, 536 N.W.2d 336, 339 (Minn. Ct. App. 1995).
- ^[37] Myers v. City of Oakdale, 409 N.W.2d 848, 850-51 (Minn. 1987).
- ^[38] Exhibit 12.
- ^[39] See Gorecki v. Ramsey County, 437 N.W.2d 646, 650 (Minn. 1989) (holding that the purpose of the VPA is to protect veterans from being removed by the use of arbitrary power, but that it “cannot be viewed as fully restricting the government’s exercise or control over its administrative affairs”).